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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VICTOR ROLAND HOPKINS III, Defendant and Appellant.	A154322 (Solano County Super. Ct. No. FCR320953)

While on probation, defendant Victor Roland Hopkins III was stopped by police and observed discarding two plastic baggies, one of which was subsequently found to contain methamphetamine. The trial court revoked defendant's probation, sentenced him to three years in county jail, and ordered him to pay various fines. Hopkins argues that the prosecution failed to establish the chain of custody for the baggie containing methamphetamine, that the quantity of methamphetamine was insufficient to sustain a conviction, and that he is entitled to a remand so that the trial court may determine his ability to pay the fines imposed. We affirm.

BACKGROUND

On May 20, 2016, Hopkins pleaded no contest to one count of felony identity theft (Pen. Code, § 530.5, subd. (a)).[1] On July 28, the trial court suspended imposition of sentence and placed Hopkins on probation for three years, with 90 days in county jail.

[1] All further undesignated statutory references are to the Penal Code.

Over the next year, Hopkins admitted three probation violations, most recently on July 28, 2017, at which time the trial court reinstated his probation.

On February 13, 2018, at around 2:45 p.m., Solano County Deputy Jacob McNeil observed Hopkins riding his bicycle against traffic. Hopkins rode across the sidewalk and into a parking lot, where McNeil and his partner attempted to contact him. Hopkins walked away from the officers between two parked vehicles, and McNeil observed him digging into his right pocket with his right hand. Hopkins then threw two plastic baggies onto the ground, one of which contained a white residue and the other of which contained a "white crystal substance," which subsequently tested positive for methamphetamine. After a hearing on April 4, the trial court found Hopkins in violation of his probation, and sentenced him to three years in county jail. The trial court also ordered Hopkins to pay a restitution fine of $900 (§ 1202.4, subd. (b)), a probation revocation fine of $300 (§ 1202.44), and a court operations assessment of $40 (§ 1465.8). This appeal followed.

DISCUSSION

Hopkins argues that the trial court's finding that he violated his probation is not supported by substantial evidence because the prosecution failed to establish the chain of custody for the baggie containing methamphetamine, and because the quantity of methamphetamine in the baggie was not usable. In a supplemental brief, he also argues that he is entitled to a remand so that the trial court may conduct a hearing on his ability to pay the various fines imposed at sentencing.

Applicable Law: The Standard of Review

Section 1203.2, subdivision (a), authorizes a trial court to revoke the supervision of a person released on probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision . . . or has subsequently committed other offenses . . . ." A trial court is accorded "very broad discretion in determining whether a probationer has violated probation." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443.) A probation violation need only be proven by a preponderance of the evidence. (*Id*. at p. 447; *People v. Jackson* (2005) 134 Cal.App.4th

929, 935.) We review the evidence adduced at the probation violation hearing in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find a probation violation. (See *People v. Urke* (2011) 197 Cal.App.4th 766, 773; *People v. Johnson* (1980) 26 Cal.3d 557, 576–577.)

The Trial Court Did Not Err in Concluding the Chain of Custody Had Been Established

With respect to the chain of custody for the substance that tested positive for methamphetamine, the testimony at the hearing was as follows. Officer McNeil saw Hopkins drop two "clear plastic baggies," and observed that "[o]ne had a white residue in it, and the other one contained a white crystal substance." He seized the baggies and booked them into evidence under case number CR 18-0783, and provided a description of the first item as "JM 1, and it was point three grams AGW of suspected methamphetamine." He also photographed the baggies and uploaded the photo into evidence.

Nate Overlid of the Solano County District Attorney Bureau of Forensic Services testified that he received an item related to case CR 18-783 for testing, and the item was "in an envelope that was taped-sealed and undamaged," which envelopes were "standard submission envelopes for controlled substances analysis." On cross-examination, Overlid testified that the substance "was inside of a submission envelope, so the standard submission envelope that we have for controlled substance analysis, it was inside one of those envelopes, but furthermore, it was inside of the heat-sealed bag, so the crystalline substance was inside of that heat-sealed bag inside of the envelope." Overlid indicated that the cut-off for describing a sample as a "residue" was 0.1 grams, and that his laboratory does not test for purity.

The sample tested by Overlid was "labeled with identifying information as to the submitting agency, the submitting officer, the laboratory or case number, the agency case number, description of the evidence, as well as the individual." The evidence description was "white crystal-like substance, in parentheses, zero point three grams AGW."

Hopkins argues that the foregoing evidence of the chain of custody was insufficient because there was no evidence as to how the substance got from the original baggie to the heat-sealed bag described by Overlid, and because there was a "weight discrepancy."

"In a chain of custody claim, ' "[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' (*People v. Diaz* [(1992)] 3 Cal.4th 495[,] 559; see also Méndez, Cal. Evidence (1993) § 13.05, p. 237 ["While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering"].) The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1448.)" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

We find no abuse of discretion in the trial court's conclusion that it was reasonably certain the sample had not been altered. McNeil testified that he personally seized the baggies and booked them into evidence with information that included the case number and the description "JM 1, and it was point three grams AGW of suspected methamphetamine," and Overlid received the sample in the standard submission envelope, "labeled with identifying information as to the submitting agency, the submitting officer, the laboratory or case number, the agency case number, description of the evidence, as well as the individual" and described as "described as white crystal-like substance, in parentheses, zero point three grams AGW." Although it was not entirely

clear from the testimony how the substance came to be in the heat-sealed bag in which Overlid received it, this is at best a single gap in the chain of custody, not some vital link in the chain of possession making it as likely as not that the evidence analyzed was not the evidence collected. As for Hopkins's argument that there was a discrepancy in weight, it appears to be based on the fact that McNeil provided a description of the sample as "point three grams AGW of suspected methamphetamine" whereas Overlid testified that the sample he received weighed 0.10 grams. But McNeil did not give any testimony as to how he arrived at the 0.3 figure, which may have been an estimate or otherwise inaccurate. In sum, the trial court did not abuse its discretion in concluding that it was reasonably certain the sample had not been altered.

This is not a case like *People v. Jimenez* (2008) 165 Cal.App.4th 75, on which Hopkins relies. In that case, the prosecution sought to introduce evidence of a purported comparison of a DNA sample taken from the defendant and DNA found on the handlebars of an abandoned bicycle. (*Id.* at p. 79.) The technician, who purportedly collected the specimen from the defendant, labeled it, and sent it to the Department of Justice (DOJ) for analysis, did not testify at all. (*Id*. at pp. 79–80.) Instead, to establish the chain of custody of the defendant's sample, a police sergeant, the chief investigating officer, and a DOJ criminalist testified. (*Ibid*.) The sergeant testified that he made arrangements with the technician to have the swabs collected and testified "conclusorily" that the technician did so. (*Id*. at p. 79.) He also "testified ambiguously that either he or the chief investigating officer—he did not specify who—gave instructions to someone—he did not specify to whom—for the swabs to be sent to DOJ. The sergeant testified—conditionally—that the swabs 'would have been properly labeled.' He did not testify at all about the basis—whether personal observation, hearsay, or conjecture the record is silent—of his testimony that she took the swabs." (*Ibid*.) And similarly, the chief investigating officer "testified that he requested DOJ comparison of the handlebar swabs with the cheek swabs and, over [defendant]'s foundational objections, that he received a report showing that the comparison 'had occurred.' " (*Id*. at p. 80.) And the DOJ criminalist testified that "he received from the police department two properly packaged

and preserved swabs with paperwork that referred to [the defendant] and that showed the submitting party was a detective who did not testify at trial, the recorded booking officer was the technician who did not testify at trial," which testimony belied the contention that it was the technician who had sent the sample to the DOJ. (*Id*. at p. 80.) The court concluded that "[r]ead together as a whole, the testimony of the sergeant, the chief investigating officer, and the criminalist fail to resolve key foundational issues about the chain of custody." (*Ibid*.)

In this case, by contrast, McNeil testified that he personally collected the baggies and booked them into evidence using the case number and a description of the contents. And Overlid testified that he personally performed the laboratory analysis on the sample after receiving it in a standard tape-sealed and undamaged envelope, again labeled with the case number and labeled with extensive identifying information. None of this testimony was conclusory and no critical witnesses who purportedly handled the sample failed to testify. Hopkins's argument regarding the chain of custody fails.

The Evidence Established Hopkins Possessed a Usable Quantity of Methamphetamine

Hopkins next argues that his probation violation must be set aside under *People v. Leal* (1966) 64 Cal.2d 504, which held that possession of minute quantities of drugs " 'not intended for consumption or sale and useless for either of these purposes is insufficient evidence to sustain a conviction for known possession of a narcotic.' " (*Id.* at p. 510 (quoting *People v. Sullivan* (1965) 234 Cal.App.2d 562, 565).)

However, as Hopkins acknowledges, "the *Leal* usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven." (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66.)

Hopkins asserts that the amount of substance tested was the "bare minimum" that could constitute a usable amount, and that "[w]ithout any evidence as to the percentage of

methamphetamine in the fiftieth of a teaspoon of white powder that was tested, it is impossible to know whether the substance in question was usable." But it was not "impossible" to know whether the substance was usable—Overlid testified clearly that the net weight of the substance was 0.10 grams, which, in his training and experience, was a "usable quantity." The percentage of methamphetamine in the substance was irrelevant, because "[n]o particular purity . . . need be proven." (*People v. Rubacalba*, *supra*, 6 Cal.4th at p. 66.) Hopkins's argument fails.

Hopkins Has Forfeited His Argument That He Is Unable to Pay the Fines

At sentencing, the trial court ordered Hopkins to pay three amounts: a restitution fine of $900 (§ 1202.4, subd. (b))[2], a probation revocation fine of $300 (§ 1202.44), and a court operations assessment of $40 (§ 1465.8). Hopkins did not object to these amounts on any basis, including his financial circumstances.[3]

Hopkins argues that he is indigent, and that under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), decided after his opening brief was filed, he is entitled to a remand so that the trial court can conduct a hearing on his ability to pay.

In *Dueñas*, the defendant was homeless, suffered from cerebral palsy, and was unable to work. (*Id*. at p. 1160–1161.) She received three juvenile citations as a teenager, and when she was unable to pay some $1,088 she was assessed for those citations, her driver's license was suspended. (*Id*. at p. 1161.) She was then convicted three times of driving with a suspended license and once for failing to appear on a driving without a license charge. (*Ibid*.) Each time, she "was offered the ostensible choice of paying a fine or serving jail time in lieu of payment. Each time, she could not afford the

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[2] Section 1202.4 requires the trial court to impose a restitution fine of not less than $300 in the case of a felony conviction, unless it finds "compelling and extraordinary reasons for not doing so." (§ 1202.4, subds. (b), (b)(1), (c).) "A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine." (§ 1202.4, subd. (c).) However, inability to pay "may be considered only in increasing the amount of the restitution fine in excess of the minimum fine . . . ." (*Ibid*.)

[3] However, at the July 28 hearing, defense counsel told the court that Hopkins was currently employed with a temp agency.

fees, so she served time in jail . . . ." (*Ibid.*) However, even after choosing jail, she remained liable for various fees associated with her convictions. (*Ibid.*)

After Dueñas pled guilty to a fourth misdemeanor charge for driving with a suspended license, she was placed on probation and ordered to pay various fees and fines, in particular, a $30 court facilities assessment under Government Code section 70373, a $40 court operations assessment under section 1465.8, and a $150 restitution fine under section 1202.4. The trial court also imposed and stayed a probation revocation restitution fine under section 1202.44. (*Dueñas, supra,* 30 Cal.App.5th at p. 1162.) Dueñas requested a hearing on her ability to pay these fines, and the trial court held one, ultimately concluding that she lacked the ability to pay certain previously court-ordered attorney fees. (*Id.* at p. 1163.) However, the court held that the $30 court facilities assessment under Government Code section 70373 and $40 court operations assessment under section 1465.8 were both mandatory regardless of Dueñas's ability to pay them, and that Dueñas had not shown the "compelling and extraordinary reasons" required by statute (§ 1202.4, subd. (c)) to justify waiving the $150 restitution fine. (*Dueñas* at p. 1162.)

On appeal, the *Dueñas* court concluded that due process "requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas, supra,* 30 Cal.App.5th at p. 1164.) The court also held that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

Because the defendant in *Dueñas* objected to the assessments and a hearing on her ability to pay was held, that case did not consider the issue of forfeiture. However, in *People v. Castellano* (2019) 33 Cal.App.5th 485, 488 (*Castellano*), the same court that decided *Dueñas* considered a similar argument raised by a defendant on whom various

fees were imposed, including a $40 court operations assessment (§ 1465.8) and the statutory minimum $300 restitution fine (§ 1202.4, subd. (b)), and who had failed to object to those fines based on inability to pay before *Dueñas* was decided. (*Castellano*, *supra*, 33 Cal.App.5th at p. 488.) *Castellano* declined to find the defendant's argument forfeited for lack of objection before the trial court, noting that "none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay. Indeed, as discussed, in the case of the restitution fine, Penal Code section 1202.4, subdivision (c), expressly precluded consideration of the defendant's inability to pay." (*Id.* at p. 489.) The court concluded that a limited remand was appropriate to provide the defendant an opportunity to request a hearing on his ability to pay. (*Id.* at pp. 490–491.)

However, where the court imposes a restitution fine in excess of statutory minimum under section 1202.4, that statute expressly permits the court to consider the defendant's ability to pay. Section 1202.4, subdivision (b)(1) provides that in the case of a felony conviction, the trial court shall impose a restitution fine of not less $300 and not more than $10,000. (§ 1202.4, subd. (b)(1).) Subdivision (c) provides that a defendant's inability to pay is not a compelling and extraordinary reason to refuse to impose the fine, but inability to pay "may be considered only in increasing the amount of the restitution fine in excess of the minimum fine." And subdivision (d) provides that "[i]n setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay . . . ," which inability the defendant bears the burden of demonstrating. (§ 1202.4, subd. (d).) On this basis, at least two recent post-*Dueñas* cases have held that a defendant forfeits a challenge under *Dueñas* to a restitution fine under section 1202.4 in excess of the statutory maximum by failing to object below. (See *People v. Gutierrez* (June 4, 2019, D073103) __ Cal.App.5th __ [pp. 37–40]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.) Division Four of this court recently adopted this reasoning in dicta. (See *People v. Johnson* 35 Cal.App.5th 134, 138 fn. 5 ["Had the court imposed a restitution fine on Johnson above the statutory

minimum, we would have come to the opposite conclusion on the issue of forfeiture, at least for purposes of that fine, since, there, it could be said that he passed on the opportunity to object for lack of ability to pay"]; see also *People v. Jones* (June 28, 2019 E069873) __ Cal.App.5th __ [p. 15].)

Here, the trial court imposed a $900 restitution fine, three times the statutory minimum of $300. Under the statutory scheme and authorities just discussed, Hopkins was obligated to object to the amount of the fine and demonstrate his inability to pay to avoid forfeiture, and such objection would not have been futile under governing law at the time of his sentencing hearing. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 ["Had defendant brought his argument to the court's attention, it could have exercised its discretion and considered defendant's ability to pay, along with other relevant factors, in ascertaining the fine amount"].) Accordingly, Hopkins was forfeited his challenge to the $900 restitution fine.

This leaves the $300 probation revocation fine imposed pursuant to section 1202.44 and the court operations assessment of $40 imposed pursuant to section 1465.8. We will likewise reject Hopkins's contention that any objections to these assessments would have been futile. Nothing in the record of the sentencing hearing indicates that Hopkins was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments, and as just discussed, Hopkins was obligated under then-existing law to create a record showing his inability to pay the $900 restitution fine, which would have served to also address his ability to pay the assessments. Given his failure to object to a $900 restitution fine based on inability to pay, Hopkins has not shown a basis to vacate assessments totaling a further $340 for inability to pay. (See *People v. Frandsen*, *supra*, 33 Cal.App.5th at p. 1154 [ability to pay argument forfeited with respect to smaller assessments where defendant failed to object to maximum restitution fine]; *People v. Gutierrez*, *supra*, __ Cal.App.5th __ [p. 40] [same].)

DISPOSITION

The judgment is affirmed.

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Richman, Acting P.J.

We concur:

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Stewart, J.

_____
Miller, J.

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